ORIGINAL

NO. 83-6150

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JESSE JOSEPH TAFERO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to
the Supreme Court of Florida

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE FLORIDA CORAM NOBIS PROCEDURE IS VIOLATIVE OF A DEFENDANT IN A CAPITAL CASE'S CONSTITUTIONAL RIGHT TO DUE PROCESS?

INDEX

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JURISDICTION

Respondent accepts the Petitioner's jurisdictional statement, with the addition that the Florida Supreme Court's order denying rehearing was entered on November 29, 1983, so the Petition for Certiorari was timely filed pursuant to Rule 20 of the rules of this Court.

STATEMENT OF THE CASE

A. SUMMARY OF PROCEEDINGS IN THE STATE COURTS

The Petitioner was convicted of two counts of first degree murder, robbery, and kidnapping in Broward County, Florida, and was sentenced to death by the trial judge for the murders in accordance with the jury's recommendation. The judgments and sentences were affirmed

by the Florida Supreme Court on direct appeal. Tafero v. State, 403 So.2d 355 (Fla. 1981), cert. denied, 445 U.S. 983 (1982). In affirming the convictions, the Florida Supreme Court specifically found there was sufficient evidence of the Petitioner's guilt and rejected his contention that co-indictee Walter Rhodes did the shooting:

> Tafero challenges the sufficiency of the evidence to convict him of murder, but the evidence against him is overwhelming. In addition to the eyewitness testimony, bullets removed from the victims match the gun in Tafero's possession at his arrest. We do not accept Tafero's contention that Rhodes' testimony was unbelievable in that Rhodes actually did the shooting. Rhodes' testimony is corroborated by both the physical evidence and the other eyewitnesses' testimony. Additionally, both truck drivers noticed Rhodes' hands in the air when the first shots were fired. The evidence shows beyond a reasonable doubt that Tafero is guilty of the premeditated murder of both Irwin and Black.

Tafero v. State, supra, at 359.

The Petitioner was previously convicted in 1967 in Dade County, Florida, for assault with intent to commit rape, entering without breaking an apartment with the intent to commit robbery, and the crime against nature. These convictions were affirmed on direct appeal. Tafero v. State, 223 So.2d 564 (3DCA Fla. 1969), cert. denied, 225 So.2d 912 (Fla. 1969). In affirming, the Court of Appeal found that:

> The record contains ample substantial evidence which supports the verdict and judgment, namely, the unequivocal testimony of both complainants that the Appellant was the man referred to as Jessie.

Tafero v. State, 223 So.2d at 568.

The Petitioner in 1979 filed a motion for new trial in the trial court with regard to the 1967 convictions,

based upon the purported confession of a third party and the alleged hearsay recantation of the State's witnesses. The trial court denied the motion and the Petitioner appealed to the Third District Court of Appeal of Florida. That court held the trial court was without jurisdiction to hear the motion for new trial, but it nonetheless treated the appeal as a request for permission to apply to the trial court for a Writ of Error Coram Nobis. Tafero v. State, 406 So.2d 89, 92 (3DCA Fla. 1981). The court found the new evidence would at best raise a jury question and would not have conclusively prevented the entry of the 1967 convictions, so the application was denied.

In November, 1982, the Petitioner filed a motion for leave to file a Petition for Writ of Error Coram Nobis in the Florida Supreme Court. The basis of the motion was the claim that his co-indictee in the capital case, Walter Rhodes, had made a statement under oath in which he had recanted his 1976 trial testimony and stated he shot the two victims. The Petitioner also submitted evidence relating to his 1967 convictions: a man named William Leiser testified the victims of the crimes had told him they knew the Petitioner wasn't involved, and a fellow convict named Robert Sheley testified he and not the Petitioner was responsible. The Petitioner argued the court should consider the evidence pertaining to the 1967 convictions because the trial court had relied on them as an aggravating factor in imposing the death sentence.

B. FACTS PERTINENT TO RELIEF SOUGHT

The Petitioner's coram nobis claim that Rhodes' recantation establishes Tafero did not shoot the victims is not a new one; the Petitioner's defense at trial and chief claim on direct appeal was that Rhodes and not he pulled the trigger. As previously noted, the contention

was rejected on direct appeal because the physical evidence and other testimony corroborated Rhodes' trial testimony. Tafero v. State, 403 So.2d 355, 359 (Fla. 1981).

Moreover, Rhodes' recantation claim that he moved to the side of the Camaro and shot the officers was inconsistent with the evidence adduced at trial. Both truck drivers who witnessed the shooting testified Rhodes was standing by the Camaro at the time of the shooting and had his hands up in the air. His empty hands remained in the air while all the shots were fired. This testimony corroborated Rhodes' trial testimony that he was in front of the cars with his hands in the air when co-defendant Sonia Jacobs fired the initial shots and the Petitioner took the gun from her and fired the rest. One of the truck driver witnesses testified Rhodes' hands were still empty when he entered the driver's side of the patrol car, and at trial Rhodes testified the Petitioner picked up the trooper's gun and casings from the pavement. The truck driver's testimony was consistent with Rhodes' trial testimony and it refuted Rhodes' recantation claim that he, Rhodes, had taken the trooper's gun after the shooting and he held both it and the fatal weapon up in the air as he entered the trooper's car.

The physical evidence at trial conclusively showed the shots were fired in the area in the middle of the Camaro on the driver's side and it likewise showed the two persons in that area were the Petitioner, who was in between the Camaro and the patrol car being held by Irwin near the trooper's windshield when the shots began, and Jacobs, who was in the back of the Camaro. Rhodes' recantation claim that he too was in the central area of the Camaro and did the shooting was patently false in light of the physical evidence and the testimony of the disinterested witnesses.

Aside from the trial evidence, there were other facts relevant to the assertions made in Rhodes' 1982 recantation statement. Rhodes' pretrial statements were all consistent with his trial testimony that the Petitioner grabbed the gun from Jacobs and fired at both officers. In January and March, 1982, Rhodes, while testifying in a different trial, reaffirmed his testimony that he did not shoot the officers. By contrast, Rhodes' 1982 statement was inconsistent with a similar statement he allegedly made to two fellow prisoners named Orf and Hysmith, whose testimony was the basis for a 1977 application for leave to file a Writ of Error Coram Nobis filed by the Petitioner, which was also denied. In the 1977 statement, Rhodes claimed he had shot the victims from the passenger side of the Camaro, through the car, which was at odds with the 1982 statement where Rhodes said he did the shooting from the driver's side. Additionally, in 1979 Rhodes claimed he did the shooting from the right front fender area of the patrol car. The three recantation statements were inconsistent with each other, and entirely different from the account of the shooting the Petitioner himself gave when he testified under oath as a defense witness at co-defendant Jacobs' trial. The Petitioner testified Rhodes had fired the shots from the front of the Camaro. He denied noticing the casings, picking them up, or seeing anyone take the trooper's gun. The Petitioner's account conflicts with Rhodes' 1982 statement where he says he, Rhodes, moved to the driver's side of the Camaro and fired the shots, the Petitioner picked up the casings, and the Petitioner passed a gun to him. Rhodes in 1982 claimed that he took the trooper's gun and held it up at face level--a sight the Petitioner would have seen if it were true.

Regarding the 1967 convictions, prior to the application in the Florida Supreme Court, the state trial

court entertained the Petitioner's Motion for New Trial. Although the Third District Court of Appeal held the trial court had no jurisdiction to hear the case, it treated the appeal as a Petition for Writ of Error Coram Nobis and in so doing, considered the witnesses' testimony and the trial court's findings. Tafero v. State, 406 So.2d 89, 93 f.n. 9 (3DCA Fla. 1981).

The trial court found the alleged newly discovered evidence was cumulative to the trial evidence since the Petitioner and several alibi witnesses testified. There were two eyewitnesses who positively identified the Petitioner by physical and photo lineups and in court. The court did not believe the witness Leiser's testimony about the alleged recantations since he gave no reasonable explanation as to why he failed to come forward sooner. The trial court also rejected the confession of Sheley as unbelievable and incredible in light of the trial testimony and the fact he didn't say he was guilty until eight years after the conviction and the Petitioner then waited four more years before taking action. The trial court also noted Sheley did not confess until after the statute of limitations had run.

REASONS FOR DENYING THE WRIT

THE FLORIDA CORAM NOBIS PROCEDURE DOES NOT VIOLATE A CAPITAL DEFENDANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS.

In Florida, it is the function of the appellate court which originally affirmed a conviction to review any subsequent application for a Writ of Error Coram Nobis and determine therefrom whether sufficient facts are alleged, which, if established by competent proof, would entitle the applicant to the writ. Cayson v. State, 139 So.2d 719 (1DCA Fla. 1962); Chambers v. State,

158 So. 153, 117 Fla. 642 (1924). The court reviews not only the application itself but the State's response and the record of the trial proceedings, Antone v. State, 410 So.2d 157 (Fla. 1982), to determine whether coram nobis will lie before granting permission to an applicant to apply for the writ at the trial level. If the appellate court finds the facts alleged are of such a vital nature that had they been known to the trial court, they conclusively would have prevented entry of the judgment, then it directs the trial court to determine the truth of the allegations in an evidentiary hearing. Hallman v. State, 371 So.2d 482, 485 (Fla. 1979).

The Petitioner asserts the coram nobis conclusiveness test denies him due process and is unfair to him because there is no rational reason for applying the conclusiveness test based solely on when the new evidence is discovered and as a capital defendant, the test should not have been applied to him. The Respondent maintains there is a rational reason for use of the conclusiveness test in any type of criminal case, including capital cases. As expressed in Hallman v. State, 371 So.2d 482, 485 (Fla. 1979), it is

> . . . predicated on the need for finality in judicial proceedings. This is a sound principle, for litigants and courts alike must be able to determine with certainty a time when a dispute has come to an end.

This Court has previously upheld Florida's coram nobis procedure as meeting due process requirements in the case of Hysler v. Florida, 315 U.S. 411 (1941). In Hysler, also a capital case, this Court held Florida has a valid interest in the just administration of its criminal law and the state Supreme Court had every right and the plain duty to scrutinize a recantation (made four years after the trial) with a critical eye as it was familiar with

the trial record. In the instant case, the state Supreme Court, in applying the conclusiveness test, reasonably concluded that the Rhodes' 1982 recantation and the matters regarding the 1967 convictions were false, for the reasons set forth in the Respondent's Statement of the Facts. That determination did not deprive the Petitioner of due process. As this Court recognized in Taylor v. Alabama, 335 U.S. 252 (1947), a capital defendant has no mandatory right to permission to apply for a Writ of Error Coram Nobis. In Taylor, the court held the affidavits supporting a petition must be read in close connection with the entire record for their reasonableness, the probability of their truth, the effectiveness of the attack they make on the original judgment, and their relationship to the general enforcement of the law with justice to all. Where the state Supreme Court has found a defendant's allegations unreasonable and no probability of truth contained therein, it is acting within its constitutional authority in denying coram nobis. Id.

The Florida Supreme Court in reviewing the allegations made in the instant case with regard to the 1976 murder convictions correctly concluded Rhodes' recantation statement was a lie and a sham. It was at odds w th the other evidence adduced at trial, it was inconsistent with prior recantation statements, and it was in disagreement with the Petitioner's own prior testimony. Concerning the 1967 felony convictions which were found as an aggravating factor in the murder cases, the matter had already been fully litigated in the trial and appellate courts and the trial court had rejected the alleged recantations and purported confession of another as unbelievable, so it would not have precluded entry of the judgments. Therefore, the Florida Supreme Court's denial of the Petitioner's application was not violative of the

Petitioner's constitutional rights. The decision was consistent with this Court's precedents of Hysler v. Florida and Taylor v. Alabama, supra, and thus, it neither conflicts with other decisions nor decided an important federal question previously unresolved by this Court. Rule 17(1)(b) and (c), Supreme Court Rules (1980). The Petition for Certiorari should be denied.

CONCLUSION

Wherefore, based upon the foregoing reasons and authorities cited therein, the Respondent respectfully requests that the Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response to Petition for Writ of Certiorari was mailed to Marc Cooper, Esq., and Sharon L. Wolfe, Esq., Suite 500, Roberts Building, 28 West Flagler Street, Miami, FL 33130, this 8th day of February, 1984.

Of Counsel